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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. URIKA MILES, Defendant and Appellant.	B162927 (Super. Ct. No. NA052386)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard R. Romero, Judge. Reversed and remanded.

Carol K. Lysaght, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and Stephanie A. Mitchell, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Urika Miles challenges his robbery conviction on the ground the trial court erred by failing to instruct the jury on aiding and abetting principles. We conclude the omission constituted prejudicial error. Appellant did not take any property from the victim, and evidence supported his theory that appellant neither knew nor shared the intent of those who took the victim's property. Accordingly, aiding and abetting instructions were required.

BACKGROUND AND PROCEDURAL HISTORY

Tromaine Ellis was beaten and robbed of his cell phone/pager (pager) after he stopped at a gas station to meet an attractive woman whom he saw on the adjacent sidewalk. Appellant and a second woman joined the first in beating Ellis, during the beating one of the women stole the pager.

A jury convicted appellant of second-degree robbery. Appellant admitted he had been convicted previously of a serious or violent felony, and then moved to dismiss the prior conviction finding that he might receive a more lenient sentence. The court denied the motion, and sentenced appellant to a second strike term of 11 years in prison.

DISCUSSION

Ellis testified unequivocally that only the women were grabbing at his pager, which was attached to his belt. The pager was the only item taken from Ellis. One of the women spotted an approaching police car, and the women walked away. Appellant walked off in a different direction but the police officer followed and immediately apprehended him. He did not have Ellis's pager. The police searched the area around the gas station, but did not find the pager. The undisputed evidence therefore establishes that appellant did not take from the victim the only item taken during the robbery.

Appellant contends that because he took nothing from the victim, he could be convicted only of robbery as an aider and abettor. He therefore contends the trial court erred by failing to instruct, sua sponte, with CALJIC Nos. 3.00 and 3.01.[1] He argues he

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[1] CALJIC No. 3.00 provides:

was prejudiced by the absence of these instructions because the jury may have convicted him without finding he had the requisite intent.

The Fifth and Sixth Amendments to the United States Constitution require that every criminal conviction rest upon a jury determination that a defendant is guilty beyond a reasonable doubt of every element of the charged crime. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510.) Absent a stipulation, this requires that jury instructions inform the jury of the elements of the charged felony. Without those instructions, a jury would not possess the necessary information to find that every element of the charged offense was established beyond a reasonable doubt. (*People v. Magee* (2003) 107 Cal.App.4th 188, 193.) Accordingly, the trial court has a sua sponte duty to instruct on all of the elements of the offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

To convict appellant of robbery, the jury should have been required to find that appellant took personal property of some value from Ellis's person or immediate presence by means of force or fear, with the intent to permanently deprive him of the

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"Persons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include:

"1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or

"2. Those who aid and abet the [commission] [or] [attempted commission] of the crime."

CALJIC No. 3.01. provides:

"A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she:

"(1) With knowledge of the unlawful purpose of the perpetrator, and

"(2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and

"(3) By act or advice aids, promotes, encourages or instigates the commission of the crime.

"[A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be present at the scene of the crime.]

"[Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.]

"[Mere knowledge that a crime is being committed and the failure to prevent it does

property. (Pen. Code, § 211; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Because the undisputed evidence showed he did not take any property from Ellis, the evidence did not permit the jury to find beyond a reasonable doubt that appellant was guilty of every element of robbery. Thus, appellant could not be found guilty of robbery based upon his own actions alone.[2] The principles of aiding and abetting were required to impose criminal liability upon appellant for the combined effect of his acts and intent and the acts of the women who took Ellis's pager.

A person aids and abets the commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of committing, facilitating or encouraging commission of the crime, by act or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) Aiding and abetting principles make an aider and abettor liable for his or her own actions and those of the accomplice. This obviates the necessity of determining the precise role each principal played in the commission of the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) An aider and abettor's criminal liability for the intended crime is based on the combined acts of all the principals, but on the aider and abettor's own mens rea. (*Ibid.*) Where a defendant's guilt depends upon an aiding and abetting theory, the court must instruct on aiding and abetting principles. (See Use Note to CALJIC No. 3.00 (7th ed. 2003) p. 100; Use Note to CALJIC No. 3.01 (7th ed. 2003) p. 101.)

People v. Cook (1998) 61 Cal.App.4th 1364 (*Cook*), upon which respondent relies, held that aiding and abetting instructions need not be given where the defendant performed an element of the offense, "even if an accomplice performed other acts that completed the crime." (*Id.* at p. 1371.) In ruling upon a subsequent federal habeas corpus petition filed by Cook, the United States District Court for the Eastern District of

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not amount to aiding and abetting.]"

[2] Appellant might have been, but was not, charged with attempted robbery based upon his own actions. Nor was the jury instructed on attempted robbery as a lesser-included offense.

California found this rule "clearly unconstitutional." (*Cook v. Lamarque* (E.D. Cal. 2002) 239 F.Supp.2d 985, 996.)

Although the California Supreme Court denied review in *Cook*, it subsequently addressed the confusion about the status of multiple principals who actively participate in a crime, as in *Cook* and the present case. In *People v. McCoy*, *supra*, 25 Cal.4th at p. 1120 (McCoy), the Court noted, "[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator. Although Lakey was liable for McCoy's actions, he was an actor too. He was in the car and shooting his own gun, although it so happened that McCoy fired the fatal shots. Moreover, Lakey's guilt for *attempted* murder might be based entirely on his own actions in shooting at the attempted murder victims. In another shooting case, one person might lure the victim into a trap while another fires the gun; in a stabbing case, one person might restrain the victim while the other does the stabbing. In either case, both participants would be direct perpetrators as well as aiders and abettors of the other. The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role."

McCoy recognizes that multiple active participants in an offense are often both direct perpetrators and aiders and abettors. While each active participant's criminal liability is based upon his own mens rea, the remaining elements of the crime may be established from the combined acts of all principals. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120.) Where a defendant does not personally perform every element of the offense, application of aiding and abetting principles imposes vicarious liability for other principals' performance of the remaining elements. Absent the application of aiding and abetting principles, a defendant who does not personally perform every element of the offense cannot, consistent with due process, be convicted of the offense. The vicarious

liability aspect of an aiding and abetting theory supplies the missing proof of guilt beyond a reasonable doubt on every element of the charged crime. Accordingly, to apply the rule announced in *Cook* in a case such as this, where no evidence showed that appellant personally committed every element of the charged offense, would violate due process. Appellant's criminal liability for robbery depended upon an aiding and abetting theory. The trial court was therefore required to instruct the jury on aiding and abetting principles. It erred in failing to do so.

The error in the present case is akin to failing to instruct upon an element of the offense, which is subject to harmless error analysis under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Sakarias* (2000) 22 Cal.4th 596, 624-625; *Neder v. United States* (1999) 527 U.S. 1, 8-9.) Thus, the error was harmless if it appears beyond a reasonable doubt that it did not contribute to the jury's verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Assessment of the prejudicial effect of the error requires a review of the evidence, the instructions given, and the jury's express and implicit findings.

The prosecution's evidence showed a coordinated, cooperative action by appellant and the two women, leaving no doubt appellant intended to rob Ellis and beat him in order to facilitate the robbery. Ellis testified that he saw the two women while stopped at a traffic light and spoke to one of them through his car window. Appellant approached both women, put his arm around the one to whom Ellis was not speaking, and said she was his girl, but Ellis could pull into the adjacent gas station if he wanted to talk to the other woman. Ellis pulled into the gas station, got out of his car, and conversed with the woman for a time. She agreed to give him her phone number, and he got back into his car to retrieve a pen. When he turned to get out of his car, appellant was standing next to the car, blocking his path. Appellant said, "This is a jack move, homey," and told Ellis he would have to fight his way out of it. Appellant then began punching Ellis in the face and tried to pull him from the car. Ellis clung to the steering wheel, but released it when one of the women began kicking his arms. Appellant and both women punched and kicked Ellis once he was out of the car. Ellis testified he felt appellant tugging at his

watch, but only the women grabbed at his pager and attempted to reach inside his pockets. Only the pager was taken.

If Ellis's testimony were the only version of the incident, the omission of aiding and abetting instructions might well have been harmless. However, defense witnesses testified to a different version of events—one in which appellant ended up at the gas station by happenstance, was not associated with the women, and engaged in a fistfight because Ellis attacked him. Appellant's girlfriend, Charnetta Haywood, and her sister Dee Dee Haywood testified they were driving in the vicinity of the gas station when Charnetta ordered appellant to get out of the car because she was furious with him. Appellant got out and headed toward two women who were standing around near the gas station. Charnetta Haywood knew Ellis from elementary and intermediate school. After a pre-trial hearing in this case, they struck up a conversation during which Ellis effectively exonerated appellant. He told her that he saw the two women at the gas station, pulled into the station at their suggestion, and talked to them. One of them began rubbing against him, then grabbed at his pockets. He turned and saw appellant "in his face," and assumed appellant had set him up for a robbery. Ellis swung at appellant, and the two started fighting. He felt someone going through his pockets, but knew it was not appellant because appellant's hands were on Ellis's neck. Ellis admitted knowing and conversing with Charnetta Haywood, but denied making the statements she attributed to him.

Thus, the competing versions of the incident left open two critical issues that would have been addressed by aiding and abetting instructions: whether appellant knew the women intended to rob Ellis or steal his property, and whether appellant intended to assist or facilitate the robbery or theft when he engaged in a fistfight with Ellis.

The instructions given did not require the jury to find that appellant possessed the necessary knowledge and intent in order to convict him. The robbery instruction[3]

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[3] The jury was instructed with CALJIC 9.40, which provides as follows: "[Defendant is accused of having committed the crime of robbery, a violation of §

informed the jury that "Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code section 211." It further informed the jury that the prosecutor was required to prove that "1. A person had possession of property of some value however slight; [¶] 2. The property was taken from that person or from [his] immediate presence; [¶] 3. The property was taken against the will of that person; [¶] 4. The taking was accomplished either by force or fear; and [¶] 5. The property was taken with the specific intent permanently to deprive that person of the property." Neither provision required the jury to find that appellant knew the women intended to deprive Ellis of his property, or that when he applied force to Ellis, he intended to facilitate or assist the women in depriving Ellis of his property. Indeed, the phrasing of the robbery instruction would permit the jury to convict appellant of robbery based upon his application of force, even if he did not know of or share the women's specific intent. Paraphrasing the list of elements at the conclusion of the instruction, the jury easily could have found the following: (1) Ellis

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211 of the Penal Code.]

"Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code § 211.

"The words 'takes' or 'taking' require proof of (1) taking possession of the personal property, and (2) carrying it away for some distance, slight or otherwise.

"['Immediate presence' means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property.]

"'Against the will' means without consent.

"In order to prove this crime, each of the following elements must be proved:

"1. A person had possession of property of some value however slight;

"2. The property was taken from that person or from [his] immediate presence;

"3. The property was taken against the will of that person;

"4. The taking was accomplished either by force or fear; and

"5. The property was taken with the specific intent permanently to deprive that

had possession of property; (2) The property was taken (by the women) from Ellis's person; (3) The property was taken against Ellis's will; (4) The taking was accomplished by appellant's application of force; and (5) The property was taken by the women, who acted with the specific intent permanently to deprive Ellis of it.

No given instruction required the jury to find that appellant personally acted with the required knowledge and intent; thus the jury made no findings showing it determined appellant possessed such knowledge and intent. Because of this we cannot find that the factual question to have been posed by the omitted instruction was necessarily resolved adversely to the appellant under the properly given instructions.

Under these circumstances, given the conflicting evidence, the failure of other instructions to cure the error, and the absence of any illuminating findings, the court's failure to instruct on aiding and abetting cannot be deemed harmless beyond a reasonable doubt.

DISPOSITION

The judgment is reversed, and the cause is remanded for a new trial.

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BOLAND, J.

We concur:

COOPER, P.J. RUBIN, J.

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person of the property."